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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Shasta)**

THE PEOPLE,

Plaintiff and Respondent,

v.

DON HAROLD LONGWOOD,

Defendant and Appellant.

C063556

(Super. Ct. No. 06F8876)

Defendant Don Harold Longwood appeals from an order of the Shasta County Superior Court revoking his probation and executing a previously stayed prison term of nine years eight months. Defendant contends (1) the trial court abused its discretion when it revoked his probation for having used marijuana because he had a valid doctor's recommendation for its use, and (2) the court could not revoke his probation for failing to submit an original copy of the doctor's recommendation because that was not part of the charged violation. We agree and shall reverse the order revoking probation and vacate the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Pursuant to a plea agreement, defendant pleaded guilty to possession of methamphetamine for sale and to possession of methamphetamine; he also admitted an on-bail enhancement and service of three prior prison terms. In June 2008, in accordance with the plea agreement, defendant was sentenced to state prison for nine years eight months, execution of which was suspended, and he was granted probation.

April 1 Petition

On April 1, 2009, the probation department filed a petition alleging defendant was in violation of his probation because he had been discharged from his mandatory drug treatment program for "noncompliance."

May 26 Petition

On May 26, 2009, the probation department filed another petition for revocation of probation, alleging that defendant had used marijuana on or about March 30, 2009. On May 29, defendant's counsel filed with the court a memorandum explaining that defendant had a doctor's recommendation for medical marijuana use, which constituted a defense to the charged violation.

On August 11, 2009, a hearing was conducted on both petitions. At the commencement of the hearing it was stipulated that defendant "was in possession of a valid recommendation for marijuana under the Compassionate Use Act" (hereafter the recommendation).

Deputy Probation Officer Steven Sinclair testified that on January 16, 2009, during a drug test, defendant told Sinclair that he would test positive for marijuana. Sinclair asked defendant if he had "a recommendation that had been modified through the court." Defendant said that he had turned in "a recommendation with the probation department, but to his knowledge he didn't really know what the modification meant." Sinclair then "explained the process to him" and defendant told Sinclair that he would get these "things done."

Deputy Probation Officer Toni McNerny testified that on March 27, 2009, she left a message on defendant's cell phone directing him to report for drug testing the following Monday, March 30. During the interim, McNerny learned that defendant had been "closed out" of his mandatory drug treatment program for failure to attend. Records of the probation department showed that on December 10, 2008, defendant had provided the probation department with a copy of the doctor's recommendation. A note in the records stated that verification of the validity of the note by the probation department was required. After defendant provided the test sample on March 30, he was arrested for his "failure at treatment." The sample tested positive for marijuana.

Defendant testified that he had been unable to attend the drug treatment program because he was tending to his father, who had become seriously disabled with a stroke. Defendant claimed

he knew that he had to submit an original copy of the doctor's recommendation for marijuana use and that he had done so.

The trial court dismissed the petition filed April 1, 2010, but found defendant in violation of the petition filed May 26.

DISCUSSION

I

Defendant contends the trial court abused its discretion by finding him in violation of probation for marijuana use when, at the time of that use, he had a valid recommendation for its use. The People respond that the court did not find defendant in violation based upon marijuana use; rather the court based its finding on defendant's failure to provide the probation department with the original recommendation. Either position is a no-win situation for the People.

In finding the violation, the court stated: "[Defendant's] defense [is] again fast and loose. His defense is he had [a] script [sic], a Proposition 215 . . . permission to use marijuana. And it's been stipulated that he did, but that's about as far as it goes because he didn't obey any probation department rules. He didn't obey terms and conditions of probation to give a prescription, which this is akin to, to the probation department. When told by probation . . . give us the original, he just blew probation off. [¶] He apparently turned in a copy in January. He was asked for the original. He was later told by [Deputy Probation Officer] Sinclair, who took the March 30th test, this is the procedure; it's been outlined to

you before; you were told back in January to give us an original; we need the original; we need to do thus and so, etc., etc. And that's because these things can be easily forged."

Following some discussion about defendant's having a valid recommendation, the court said: "[W]hat I'm saying is that you don't obey rules. You don't play by the book, even when people lay it out and say, this is what we need from you. Real simple to pick up the original and give it to the probation officer."

After referring to defendant's failure to comply with the rules regarding his drug treatment program, which related to the April 1 petition the court had just dismissed, the court continued: "So, if you turn in a dirty test . . . that demonstrates marijuana and you haven't crossed your T's and dotted your I's, I'm going to find by a preponderance of the evidence that you are in violation of probation."

At the sentencing hearing, the court stated that for "smoking a joint" defendant had put the court in a position of "putting [him] into jail for nine years eight months."

On this state of the record, we cannot determine with reasonable certainty whether the court was revoking probation because defendant had used marijuana or because he had failed to provide the original recommendation, or both of the foregoing. However, as noted, it matters not.

Assuming the court found defendant in violation for having used marijuana, the stipulation that he had a valid doctor's

recommendation for its use constitutes a complete defense to the alleged violation (*People v. Tilehkooh* (2003) 113 Cal.App.4th 1433, 1441-1443), and the People do not contend otherwise.

Assuming the court based the violation on defendant's failure to provide the probation department with an original copy of the recommendation, this was not a charged violation. The May 26 petition set forth precisely the condition of probation alleged to have been violated: "That he not use or possess any controlled substances unless prescribed by a physician and that any prescriptions be immediately reported by the defendant to the Probation Officer." Under the heading "Alleged Violation" the petition stated: "On or about 03/30/09, the defendant used marijuana" as shown by the sample he gave. Thus, the violation defendant was charged with was specifically his use of marijuana on or about March 30, 2009.

Due process requires that a defendant be given notice of the charges underlying the claimed violation of probation and meaningful opportunity to defend. (*Black v. Romano* (1985) 471 U.S. 606, 611-612 [85 L.Ed.2d 636, 642-643].) Probation may be revoked only on the basis of the charged violation. (*People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173-1174.) For example, in *Mosley* the defendant was on probation for rape when a petition was filed charging a new rape as the sole reason for a violation of probation. (*Id.* at pp. 1169-1170.) The jury found the evidence of the rape insufficient and returned a not guilty verdict. However, based upon evidence at the trial that

defendant had consumed alcohol, which was a violation of another condition of his probation, the trial court for that reason found him in violation of probation. (*Id.* at pp. 1172-1173.) *Mosley* held that this procedure violated due process notification requirements and reversed the revocation of probation. (*Id.* at pp. 1173-1175.)

A similar result follows here if the court based its violation on a finding that defendant failed to comply with the probation officer's order that he provide an original doctor's recommendation for marijuana use, since that condition was not alleged as a violation. Consequently, whether the court's revocation of probation was based on defendant's use of marijuana on March 30, 2009, or upon his failure to provide the probation department with the original copy of the recommendation, reversal of the order revoking probation and the ensuing sentence must be vacated.

DISPOSITION

The trial court's order revoking defendant's probation is reversed and the judgment vacated. The matter is remanded to the Shasta County Superior Court for further proceedings.

BUTZ, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.